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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No. 73-860

THOMAS MINYARD, TED SPURLOCK, CLAIR PLATT, JAY REESE; APACHE COUNTY BOARD OF SUPERVISORS and JAMES A. McDONALD, LARRY STRADLING and ARTHUR LEE, constituting the members thereof and MARGARET LEE, in her official capacity as Clerk of the Apache County Board of Supervisors,

Petitioners,

vs.

TOM SHIRLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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THOMAS MINYARD, TED SPURLOCK, CLAIR PLATT, JAY REESE; APACHE COUNTY BOARD OF SUPERVISORS and JAMES A. McDONALD, LARRY STRADLING and ARTHUR LEE, constituting the members thereof and MARGARET LEE, in her official capacity as Clerk of the Apache County Board of Supervisors,

Petitioners,

vs.

TOM SHIRLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

The above captioned Petitioners pray that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Arizona entered by that Court in Cause No. 11237 on September 7, 1973.

Opinion Below

The opinion of the Supreme Court of Arizona is not yet officially reported, but is unofficially reported in 513 P.2d 939. The

opinion of that Court denying rehearing is not reported. Copies of the original opinion, the Order denying rehearing and the lower court judgment are appended hereto.

Jurisdiction

The Judgment of the Arizona Supreme Court was entered on September 7, 1973. A timely filed Motion for Rehearing was denied on October 2, 1973; this Petition for Certiorari was filed within 90 days of the original Judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. The Respondent is an unemancipated Navajo Indian residing within the Navajo Reservation. Relying upon Sections One and Two of the 14th Amendment to the United States Constitution, the United States Supreme Court in *Elk v. Wilkins,* 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643 (1884) held that such Indians are not citizens of the United States. The decision below, by implication, is contrary to *Elk v. Wilkins.* Consequently, a major question presented in this case is whether the Respondent is a citizen of the United States or of the State of Arizona and therefore qualified to hold the office of Apache County Supervisor? Comprised within that issue is the question of whether 8 U.S.C. § 1401 (a)(2), which purports to confer citizenship upon the Respondent, is contrary to the 14th Amendment to the United States Constitution, and thus unconstitutional.

2. Is the Respondent a resident of Apache County, Arizona and therefore qualified to hold the office of Apache County Supervisor?

3. Does allowing the Respondent, an unemancipated Navajo Reservation Indian, to hold the office of Apache County Supervisor when he and his Reservation Indian constituents are immune from taxation, constitute Taxation without Representation and

Representation without Taxation and thereby violate the Petitioners Rights of Equal Protection and Due Process of Law under the 5th and 14th Amendments to the United States Constitution?

4. Does allowing the Respondent to hold the office of Apache County Supervisor when he is not subject to the civil and criminal laws and jurisdiction of the Courts to the same extent as the Petitioners, violate the Equal Protection and Due Process Clauses of the 5th and 14th Amendments to the United States Constitution?

5. Are the Civil Rights of the Petitioners, established under 42 U.S.C. § 1981, violated by the Respondent holding the office of Apache County Supervisor when he is not subject to same pains, penalties, punishments, and taxes as are the petitioners?

Constitutional Provisions Involved

Amendment V

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Amendment XIV

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole numbers of persons in each State, *excluding Indians not taxed.*" (Emphasis supplied).

Statutes Involved

The Federal Statutes involved are 8 U.S.C. § 1401 (a) (2) and 42 U.S.C. § 1981. The Arizona Statutes involved are A.R.S. §§ 38-201 and 11-211. Because these provisions are lengthy, their pertinent text is set forth as Appendix E.

Statement Under Rule 33 (2) (b)

Since this proceeding draws into question the constitutionality of 8 U.S.C. § 1401, an act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. § 2403 may be applicable.

Statement of the Case

This suit arises out of an election in Arizona for Apache County Supervisor in Supervisoral District No. 3 held in November of 1972. In that election the Respondent, an unemancipated Navajo Indian, received a majority of votes for the office of Supervisor in Supervisoral District No. 3. The Petitioners, Minyard, Spurlock, Platt and Reese are non-Indian residents of Apache County and are the owners of real and personal property subject to taxation. (Findings of Fact, ¶1). Petitioners Larry Stradling, Arthur Lee, and Margaret Lee are members of the Apache County Board of Supervisors and Clerk thereof. Petitioner McDonald was the third member of the Board until replaced by the Respondent by the erroneous decision of the Arizona Supreme Court. The Respondent is a Navajo Indian residing on the Navajo Indian Reservation who owns no property off the Reservation and, as a consequence of his status as a Reservation Indian, pays no taxes on real or personal property which he owns on the Reservation. (Findings of Fact, ¶2). He also is not subject, for the most part, to the criminal and civil jurisdiction of the state or federal courts or amenable to state or federal law.

The Petitioners, Minyard, Spurlock, Platt and Reese (hereinafter designated "taxpayers") brought suit in the trial court to enjoin the members of the Board of Supervisors and the Clerk thereof (also petitioners herein, hereinafter designated "Supervisors") from issuing a Certificate of Election to the Respondent, Tom Shirley (hereinafter designated "Shirley"). The complaint alleged that it would violate the taxpayers rights to Due Process of Law and Equal Protection of Law under the 5th and 14th Amendments to the United States Constitution if Shirley were allowed to hold a public office wherein he would have the power to impose county property taxes upon the non-Indian taxpayers of the county (who constitute a minority of the population) and to spend said tax money while the Respondent Shirley and his Reservation Indian constituency are immune from the payment of the taxes he would impose. Plaintiffs also alleged that it would violate the 5th and 14th Amendments to the Constitution for Shirley to hold public office when he is immune from most county, state and federal laws and civil and criminal process. A question of state law concerning a conflicting public office was also raised which was ruled on by the trial court in the taxpayers' favor, but reversed by the Arizona Supreme Court which consequently required the Arizona Supreme Court to rule upon the Constitutional issues presented. The Arizona Court's ruling on this question of state law is not challenged here.

A Temporary Restraining Order was issued upon filing the Complaint enjoining the Supervisors from issuing a Certificate of Election to Shirley. The action was then removed to Federal Court by Shirley, but was remanded to the State Court because of the question of state law heretofore referred to. Soon after remand the taxpayers filed a Motion for Summary Judgment on the merits of the entire case. Shirley filed a Motion for Judgment on the Pleadings to be argued at the same time. It was agreed by counsel for all parties that the ruling on the Preliminary

Injunction would constitute a ruling on the Permanent Injunction (R.T. at 8 & 9). The Motion for Summary Judgment specifically raised and briefed each of the federal questions presented in this Petition for Certiorari as evidenced by the trial court record which has been certified to this Court. In the Motion for Summary Judgment the issues of citizenship and residency were briefed at pages 23-33, the issue of jurisdiction at 15-22, the issue of civil rights at 22, and the issue of taxation at 10-15. The trial court granted the injunction and made Findings of Fact and Conclusions of Law which treated the issues as follows:

(1) The trial court rejected the taxpayers' proposed finding that Shirley was not a citizen and resident of the United States and Arizona but rather found that Shirley was "a qualified voter" (Findings of Fact, ¶2) which presupposes Shirley's citizenship and residence under A.R.S. § 38-201.

(2) The trial court found that Shirley's immunity from taxation "would deprive Plaintiffs of equal protection of the law under the 5th and 14th Amendments to the United States Constitution". (Conclusion of Law, ¶2).

(3) The trial court found that there could be no civil or criminal personal or subject matter jurisdiction over Shirley or his activities in many instances, and that his holding office under those circumstances would deprive the Plaintiffs "of any recourse in a court of law were Tom Shirley to engage in criminal or civil violations of law, thereby depriving Plaintiffs, as taxpayers, of due process by which either their tax monies or the property purchased with their taxes might be recovered". (Conclusion of Law, ¶3).

After the Preliminary Injunction was entered by the trial court, Shirley then sought review in the Arizona Supreme Court by a Petition for Special Action which the Arizona Supreme Court accepted. At this stage, Shirley designated himself "Petitioner" and the Board of Supervisors and Plaintiffs below as "Respondents". The taxpayers opposed the requested relief in a "Memo-

randum in Opposition to Relief Requested in Petition for Special Action" wherein the federal and constitutional points raised in the "Questions Presented" by this Petition were briefed under the following principal headings:

"B. TAXATION WITHOUT REPRESENTATION AND REPRESENTATION WITHOUT TAXATION". (at page 15 of the memorandum).

"C. THE STATE AND FEDERAL COURTS IN MOST INSTANCES WILL LACK PERSONAL JURISDICTION OVER TOM SHIRLEY AND SUBJECT MATTER JURISDICTION OVER HIS ACTIONS IN OFFICE". (at page 20 of the memorandum).

"D. PETITIONER IS INELIGIBLE TO HOLD OFFICE SINCE HE IS NEITHER A RESIDENT OF ARIZONA NOR A CITIZEN OF ARIZONA OR THE UNITED STATES". (at page 30 of the memorandum).

"D. (sic) PETITIONER'S HOLDING THE OFFICE OF SUPERVISOR WOULD VIOLATE THE CIVIL RIGHTS ACT". (at page 42 of the memorandum).

The Arizona Supreme Court on September 7, 1973 granted the relief requested by Shirley in the Special Action. In so doing, the Arizona Supreme Court discussed only those federal questions briefed in heading "B" and "C" quoted above. The questions clearly raised both at trial and in the Arizona Supreme Court concerning the Petitioner's citizenship and residency were not ruled upon except inferentially by stating that the Reservation Indians are, by prior Arizona case law, entitled to vote in Arizona which presumes citizenship and residency. The question raised by the taxpayers at trial and before the Arizona Supreme Court concerning violation of the Civil Rights Act was not mentioned in the Opinion.

The Supervisors also argued before the Arizona Supreme Court that their right to equal protection under the 14th Amendment and their rights under the Civil Rights Act would be violated if Shirley were permitted to hold the office of County Supervisor.

(Supervisors response to Petition for Special Action at page 2 & 3). The Arizona Supreme Court failed to rule on these issues as they relate to the Supervisors.

Ruling on the question of lack of jurisdiction over Tom Shirley, the Court held:

> "Concerning the question of whether Tom Shirley is immune from service of civil process by residing on the reservation, we fail to see how this could affect his office."

Ruling on the question of Shirley's immunity from taxes he would impose, the Court held:

> "We cannot find any violation of the 5th or 14th Amendments on this account."

A joint Motion for Rehearing was timely filed by the taxpayers and Supervisors particularly stressing that the Court should rule on the issues of citizenship, residency and civil rights which it had ignored. The Motion for Rehearing and a Motion for Stay of Judgment pending appeal, which had also been filed, were denied on October 2, 1973. According to the mandate from the Arizona Supreme Court, the trial court then entered judgment on October 11, 1973 quashing the preliminary injunction, entering judgment on the pleadings in favor of Shirley and ordering that he be certified which judgment was carried into effect.

Reasons For Granting The Writ

There have been no prior recorded opinions by any court in this country determining whether or not an unemancipated Reservation Indian may hold public office. That unique question is posed in this case. Apache County is located in the Northeastern corner of Arizona where, according to table 34 of the 1970 Census of Population (Pl. Ex. 2), 23,994 of the 32,298 people in the county are Reservation Indians (approximately 75%). The recent efforts of the Indians to become involved in politics outside of the Tribe has presented a situation where the minority of Apache County residents who pay all of the county taxes and are subject to all of the pains and penalties of state and federal law

will shortly become subservient to the dictates of the *Navajo Nation* while the residents of that Nation are essentially immune from the taxes of this county and obedience to county and state law. The resolution of the questions presented by this case are of supreme importance not only to 7,000 residents in Southern Apache County, but the residents of other counties with large Reservation Indian populations such as McKinley County, New Mexico with approximately 60% Reservation Indians and Navajo County, Arizona with approximately 50% Reservation Indians.

While the Arizona Supreme Court failed or refused to deal directly with the issue of citizenship, residency, or the Petitioners' Civil Rights, these issues were clearly raised in the trial and appellate courts below. This Court has consistently held that constitutional questions shown by the record to have been raised in the State Court give the United States Supreme Court jurisdiction to review the case notwithstanding that the appellate court of the state did not refer to the questions in its opinion. *International Harvester Co. v. Missouri*, 234 U.S. 199, 34 S.Ct. 859, 58 L.Ed. 1276 (1914). See *Green Bay, etc., Canal Co. v. Patten Paper Co.*, 172 U.S. 58, 19 S.Ct. 97, 43 L.Ed 364 (1898); *Fox River Paper Co. v. Railroad Comm. of Wisc.*, 274 U.S. 651, 47 S.Ct. 669, 71 L.Ed. 1279 (1927); *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux*, 279 U.S. 737, 49 S.Ct. 485, 73 L.Ed. 931 (1929); *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930); *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed. 2d 572 (1969).

I. *CITIZENSHIP AND RESIDENCY*

As citizenship and residency is fundamental to the qualification to hold office, A.R.S. §§ 38-201 and 11-211, the Arizona Supreme Court clearly erred in not considering these questions in light of the 14th Amendment to the Constitution and the

opinion of the United States Supreme Court in *Elk v. Wilkins*, 112 U.S. 94, 75 S.Ct. 41, 28 L.Ed. 643 (1884).

It is highly significant to this petition that *Elk v. Wilkins* is the only reported case where the citizenship of Reservation Indians has been thoroughly considered in the light of the language of the 14th Amendment which is the supreme law of the land governing citizenship. While occasionally other cases, and indeed one or two United States Supreme Court decisions, have in dictum perfunctorily stated that the Reservation Indian is a citizen, in no case except *Elk v. Wilkins* has the court studied and ruled upon the constitutional aspects of citizenship of Reservation Indians in light of Sections One and Two of the 14th Amendment. The pertinent portions of those sections provide:

> "SECTION 1. ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES *AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS* OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE." (Emphasis supplied).

and

> "SECTION 2. REPRESENTATIVES SHALL BE APPORTIONED AMONG THE SEVERAL STATES ACCORDING TO THEIR RESPECTIVE NUMBER, COUNTING THE WHOLE NUMBER OF PERSONS IN EACH STATE, *EXCLUDING INDIANS NOT TAXED.*" (Emphasis supplied).

Relying upon the above quoted portions of the 14th Amendment, the United States Supreme Court in *Elk v. Wilkins, held that the Reservation Indian is not a citizen.* The compelling reasoning of the Supreme Court on this issue was:

> "[Section 1 of the 14th Amendment] contemplates two sources of citizenship and two sources only; birth and naturalization. The persons declared to be citizens are *'all persons born or naturalized in the United States and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction and owing them direct and immediate allegiance.* And

the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization Acts, or collectively, as by the force of a treaty by which foreign territory is acquired.

Indians born within the territorial limits of the United States, members of and owing immediate allegiance to one of the Indian Tribes, an alien though dependent power, although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the 1st. section of the 14th Amendment, than the children of subjects of any foreign government born within the domain of that government; or the children, born within the United States, of ambassadors or other public ministers of foreign Nations.

This view is confirmed by the 2d section of the 14th Amendment, which provides that 'Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.' Slavery having been abolished and the persons formerly held as slaves made citizens, this clause fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original Constitution as counted only three fifths of such persons. *But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis or representation in which all other persons are now included, is wholly inconsistent with their being considered citizens."* (28 L.Ed. at 646) (Emphasis supplied).

Since *Elk v. Wilkins* has never been overruled or even distinguished on this point by later cases, the implication of the Arizona Supreme Court in the decision below that the Reservation Indian is a citizen is not in accord with this prior applicable decision of the United States Supreme Court.

The Respondent, both at trial and in the Supreme Court, has attempted to counter the question of citizenship by relying upon

8 U.S.C. § 1401 (R.T. at 97 and Petitioners Objection to Respondents' Motion for Rehearing and Stay at 4): That statute provides:

> "(a) The following shall be nationals and citizens of the United States at birth:
>
> (1) a person born in the United States, and subject to the jurisdiction thereof;
>
> (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe . . ." (Emphasis supplied).

The Respondent has contended below that this statute purports to confer citizenship on Indians who are not subject to the jurisdiction of the states and not subject to taxation in contravention of the 14th Amendment as interpreted by the Supreme Court in *Elk v. Wilkins.* Consequently, the constitutionality of the statute, in light of the 14th Amendment, is placed directly in issue.

Since *Elk v. Wilkins* this Court and lower courts have continually ruled that the state and federal courts do not have jurisdiction over the Reservation Indians and that they are generally not subject to taxation. *United States v. Kagama,* 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959); *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed. 2d 165 (1965); *McClanahan v. State Tax Commission,* .....U.S....., 93 S.Ct....., 36 L.Ed. 2d 129 (1973); *Commissioner of Taxation v. Brun,* 174 N.W. 2d 120 (Minn. 1970); *Martin v. Denver Juvenile Court,* 493 P.2d 1093 (Colo. 1972). These decisions have only emphasized that there is no jurisdiction over the Reservation Indian and that he is not taxed within the meaning of the 14th Amendment. Thus, this court must review the question of citizenship under the 14th Amendment in light of this trend.

Because of the limited jurisdiction which the states have over Reservation Indians, the question of residence also presents substantial constitutional questions. Can one who is not subject to

the civil and criminal processes of a jurisdiction serve as a public officer within that jurisdiction? The public policy behind the residency requirement is to assure that one holding office has a valid interest in that government which he proposes to control and to assure that he is subject to the civil and criminal process of that jurisdiction as are other public officials and the general population within that jurisdiction. *See State v. Van Beek,* 87 Iowa 569, 54 N.W. 525 (1893). The Arizona Supreme Court has stated that Indian Tribes are less amenable to suit than a *foreign nation. Morgan v. Colorado River Indian Tribe,* 103 Ariz. 425, 443 P.2d 421 (1968) (fn. at 428). Thus, the current legal status of the Reservation Indian is totally contrary to the concept of his being a resident of a state or county. Only this court can effectively reconcile the nonsequitur relationship of the Indian's membership in a soverign nation with that of residency within a county and state.

II. *TAXATION*

200 years ago this country fought a Revolutionary War with England over the unjust and vicious principle of taxation without representation. The petitioners and 7,000 other non-reservation residents of Apache County face this same fatal principle of taxation without representation as well as representation without taxation. The Navajo Reservation Indians have recently filed suit in the Arizona Federal Court asking that the Supervisoral Districts of Apache County be redistricted under the one-man, one-vote rule which will assure the Navajos of complete control of the Board of Supervisors and consequently county taxes. (Complaint attached as appendix D of which the court may take judicial notice). We can conceive of no principle which is more offensive to the fundamentals of the American Democratic Process than to permit those in public office to be immune from the taxes they impose upon their constituents. Since those who are subject to property tax constitute a small minority of the population of the

county, the taxpayers will not have the power to vote out of office by democratic process those who impose the tax. The taxpaying residents will be the subjects of a colonial power — the Navajo Nation — and taxed without representation in the same fashion England imposed taxes upon the American Colonies. While the Constitution contains no specific guarantee against taxation without representation, it must be implied in the Due Process Clause since if the power to tax cannot be controlled by those who are subject to the tax, then the property of the taxpayer may be taken without due process of law. It devolves upon this Court to determine whether or not the principle upon which this nation was founded is protected by our Constitution.

In addition, the imposition of taxes by the respondent upon only non-Indians violates the Equal Protection Clause of the Constitution. The personal and real property which Shirley owns on the reservation is immune from tax even though all non-Indian residents of Apache County are required to pay tax on their real and personal property *whether it is located on or off the Reservation;* Shirley is immune from Arizona State income tax earned on the Reservation although all other citizens must pay income tax *whether earned on or off the Reservation.*

The question of discrimination in favor of Indians *based upon race* has never been previously presented to or considered by any court; it can be satisfactorily resolved only by the highest federal court.

III. *JURISDICTION*

Prior rulings by this and lower courts severely limiting the criminal and civil jurisdiction over Reservation Indians pose serious questions not previously considered by this court, namely, how does a governmental entity protect itself and its constituency from the criminal and civil nonfeasance or malfeasance of a public officer when the declared legal status of that official places him beyond the jurisdiction of the courts and laws of that governmental entity?

Should the respondent engage in malfeasance or nonfeasance in office, the taxpayers, the Board of Supervisors and the State itself would not be able to obtain personal jurisdiction over the respondent while he remains on the Reservation, his residence. *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959); *Martin v. Denver Juvenile Court,* 493 P.2d 1093 (Colo. 1972). Second, of the act of malfeasance or nonfeasance occurs on the Reservation, there will be no subject matter jurisdiction over the case. *Williams v. Lee, supra.* Finally, a judgment against the respondent would be a nulity, as there would be no jurisdiction to execute upon the respondents' property to satisfy the judgment. *Commissioner of Taxation v. Brun,* 174 N.W.2d 120 (Minn. 1970).

A few examples of the effect of such jurisdictional limitations are: (1) The bond of a public officer required by A.R.S. § 38-252 would be useless. Indeed, the United States Attorney General has so opined. 18 Op. A.G. 181 (1885) (stating that a Reservation Indian could not hold the office of U.S. Postmaster). (2) A.R.S. § 38-291 (8) and A.R.S. § 38-293 could not be utilized to remove Shirley from office should he commit crimes on the Reservation or remain on the Reservation after committing crimes requiring his removal from office. (3) His office could not be judicially vacated pursuant to A.R.S. § 38-291 in case of Shirley's insanity, absence from the state, violation of official duties or actions which would void his election. (4) The taxpayers or county could not receive judgment or collect sums forfeited by public officers for certain acts under A.R.S § 11-223. (5) A mandamus action could not be brought to compel Shirley to perform his duty in office while on the Reservation.

This court has recently held that taking property without prior notice or hearing is unconstitutional even though the right to recover such property is granted in subsequent proceedings. *Sniadach v. Family Finance Corporation,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct.

1983, 32 L.Ed.2d 556 (1972). *A fortiori,* the taxpayers and Supervisors would be deprived of property without due process when there is no legal process whatsoever to remedy a wrong of a public official. This petition calls upon this Court to determine whether the respondent can undertake the high trust of a public office while he is immune from judicial recourse to which other public officers are subject.

IV. *VIOLATION OF THE CIVIL RIGHTS ACT*

42 U.S.C. § 1981 of the Civil Rights Act provides:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, *to sue,* be parties, give evidence, and to the full and equal benefit of the laws and proceedings for the securities of persons and property as enjoyed by white citizens, *and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other."* (Emphasis supplied).

The benefits of 42 U.S.C. § 1981 clearly protect the constitutional rights of white Americans as against racial minorities. *Central Presbyterian Church v. Black Liberation Front,* 303 F. Supp. 894 (D. Mo. 1969).

If this court determines that the Indian is not "within the jurisdiction of the United States" then the Civil Rights Act may be inapplicable, but, of course, then Shirley is clearly ineligible for office under the 14th Amendment. If Shirley is within the jurisdiction of this country, then this court must determine the very far reaching question raised by both the taxpayers and Supervisors of whether under the Civil Rights Act a Reservation Indian may hold public office when he is not subject to suit, and to the same "punishment, pains, penalties, taxes, licenses, and exactions of every kind" as are the taxpayers and the other board members.

The violation of the Civil Rights Act and the Equal Protection Clause of the Constitution by Shirley's holding office is vividly demonstrated by the fact that the non-Indian members of the

Board of Supervisors are fully subject to all criminal and civil actions against them, regardless of where they reside in Apache County—whether on or off the Reservation. They are subject to all county or state taxes, and are subject to the same pains, penalties, and exactions of every kind that apply to Whites, Mexican-Americans, Negros and Chinese residents of Apache County. Yet, Tom Shirley, who holds the *identical* office is not subject to a great many of these same pains, penalties, taxes and exactions. Further compounding the inequity, Shirley, as one member of the legislative body of the county, will legislate that these pains, penalties, taxes and exactions shall apply to all county residents except himself and his Navajo Indian constituency.

The courts of this country have not previously been called upon to interpret the Civil Rights Act in light of the Reservation Indian's claim to all rights of citizenship but disclaimer of all responsibilities. This substantial federal question is appropriate for resolution by this Court.

V. *CONCLUSION*

The Indian Reservation is a strange entity conceived and established by our Federal Government. The Reservation Indian, impelled by prior decisions of this court, now occupies a position as a "most favored citizen" unique among all other races and people in this country. A combination of congressional and court action has created a legal status the very essence of which violates the non-Reservation population's Civil Rights and rights to Equal Protection and Due Process of Law. Whenever responsibilities of citizenship, such as taxation and allegiance to courts and law are involved, the Reservation Indian is a member of a "soverign, autonomous nation". However, when the rights of citizenship are at issue, such as voting, holding public office, and the right to federal, state and county tax benefiits, the Reservation Indian is a full-fledged citizen and resident of the nation, state and county. The inconsistency makes reason stare.

The time has come for this court of last resort to resolve these obvious constitutional inequities. Either the Reservation Indian is a full-fledged citizen of the United States and therefore subject to like "punishment, pains, penalties, taxes, licenses, and exactions of every kind" suffered by all other races of people in this country, or, he is a member of a soverign nation with the right to govern his nation and his people, but not to govern those persons in governmental subdivisions to which he owes no allegience and pays no taxes.

The import of this case is of great legal and historical significance. The constitutional issues raised affect thousands of non-Indians living in the vicinity of the Reservations and shall continue to plague the courts until resolved by this high court. These issues have not heretofore been determined by this court with the exception of the decision in *Elk v. Wilkins* which is contrary to the ruling of the court below. Consequently, this case is particularly appropriate for the exercise of this court's discretionary jurisdiction.

For these reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 1st day of December, 1973.

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APPENDIX A

IN THE SUPREME COURT OF THE

STATE OF ARIZONA

In Banc

TOM SHIRLEY,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF APACHE; LAURANCE T. WREN, JUDGE OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF COCONINO (Sitting in Apache County); THOMAS MINYARD, TED SPURLOCK, CLAIR PLATT, JAY REESE, APACHE COUNTY BOARD OF SUPERVISORS and JAMES A. McDONALD, LARRY STRADLING and ARTHUR N. LEE, constituting the members thereof and MARGARET LEE, in her official capacity as Clerk of the Apache County Board of Supervisors, Real Parties in Interest,

Respondents.

} No. 11237

Filed Sept. 7, 1973

SPECIAL ACTION

PRAYER FOR RELIEF GRANTED

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LOCKWOOD, Justice:

This is a special action by Tom Shirley as petitioner against the Apache County Board of Supervisors and certain others for the purpose of vacating the preliminary injunction order issued in an action against Tom Shirley by the respondents in this case, which prevented his assuming the office of Supervisor of Apache County Supervisorial District No. 3, and requiring the Board of Supervisors to certify Shirley as the duly elected County Supervisor of such district.

It appears that Tom Shirley is an enrolled member of the Navajo Indian Tribe, residing within the exterior boundaries of the Navajo Indian Reservation in the State of Arizona and in the boundaries of Supervisorial District No. 3 of Apache County. On November 7th at the general election the petitioner received 3,169 votes for Supervisor of the Apache County Supervisorial District No. 3 as opposed to 1,105 votes received by his opponent, Thomas E. Minyard. Having received a majority of the votes cast, the Board of Supervisors nevertheless failed to certify the petitioner as duly elected. Thomas E. Minyard, the unsuccessful candidate, together with Ted Spurlock, Clair Platt and Jay Reese brought an action against the Apache Board of Supervisors seeking an injunction restraining the Supervisors from issuing a Certificate of Election to Tom Shirley, alleging as grounds therefor that its issuance would violate the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution and A.R.S. § 11-211, making a person holding any other county or precinct office ineligible to the office of Supervisor.

The petitioner removed the pending action to Federal Court on November 20, 1972 and after some discovery and filing of various legal memoranda and oral argument, on March 21, 1973 the matter was remanded by the Judge of the United States District Court for the District of Arizona, to the Arizona Superior Court for determination.

The petitioner filed a motion for judgment on the pleadings and to vacate the temporary restraining order and Minyard filed a motion for summary judgment as well as a motion for preliminary injunction. The motion for preliminary injunction by Minyard was granted by the Superior Court on the grounds that (1) Minyard did not have any other adequate remedy at law; (2) Minyard had established a prima facie case that he would prevail on the merits of the matter since: (a) petitioner was immune from service of civil process while on the Navajo Reservation; (b) petitioner did not own any real or personal property subject to taxation by the State of Arizona, and (c) petitioner was a trustee for the Apache County School District No. 18 in contravention of A.R.S. § 11-211 (A) and A.R.S. § 38-296 (A) on November 7, 1972, a position from which he resigned on November 22, 1972, and (3) Minyard would suffer irreparable harm and injury if the preliminary injunction was not granted.

This court has held that Indians, even though living on a reservation are entitled to vote. Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948). Shirley, a member of the Navajo Tribe living on that part of the Navajo Reservation within Apache County Supervisorial District No. 3 was therefore a qualified elector of the Supervisorial District.

The county officers are created by Article 12 of the Arizona Constitution. Section 3 thereof names the county officers, including Supervisor, and § 4 provides that: "The duties, powers and qualifications of such officers shall be as prescribed by law." The Arizona Legislature has provided the qualifications of Supervisor in A.R.S. § 11-211 (A). Therein it is provided:

> "* * * a board of supervisors shall consist of three members * * * who shall be qualified electors of their supervisorial district and who shall be elected at a general election at which the president of the United States is elected."

No other qualifications have been "prescribed by law". The Arizona Legislature was thus given authority to prescribe the qualifications of Supervisor which it has done. In the absence of

further legislation, the Court is powerless to add to or detract from the qualifications of such officer.

It is also provided in A.R.S. § 11-211 (A) that "No person holding any other county or precinct office is eligible to the office of supervisor.

Since Tom Shirley resigned from the Office of Trustee of Apache County School District No. 18 before the time for assuming the office of Supervisor in January of 1973, he was no longer a trustee and therefore became eligible to hold the office of Supervisor pursuant to A.R.S. § 11-211 (A).

The two statutes upon which respondents rely are A.R.S. § 38-296 and A.R.S. § 11-211. The one reads so far as pertinent:

> § 38-296. Limitation upon filing for election by incumbent of elective office; exceptions
>
> "A. No incumbent of an elective office whether holding by election or appointment, shall be eligible for nomination or election to any office other than the office so held, nor shall the nomination papers of such incumbent be accepted for filing.
>
> * * *
>
> "D. A person violating any provision of this section is guilty of misfeasance in office and the *office held by such person shall be declared vacant.*" (Emphasis added.)

and is general in nature, applying to all public offices.

The second reads:

> § 11-211. Membership; qauifications; term
>
> "A. There shall be in each county * * * having a population of less than two hundred thousand as determined by the latest United States decennial census, a board of supervisors shall consist of three members, * * * who shall be qualified electors of their supervisorial district and who shall be elected at a general election at which the president of the United States is elected. They shall enter upon their duties on January 1 subsequent to their election, and shall hold office for four years. No person holding any other county or precinct office is eligible to the office of supervisor."

and is special in nature, referring specifically to the Office of

County Supervisor. It is true that in case of conflict, the special statute will apply over the general. However, it is also a rule that in applying two statutes, the court will attempt to harmonize both. State Land Dept. v. Tucson Rock and Sand Co., 107 Ariz. 74, 481 P.2d 867 (1971); State ex rel Larson v. Farley, 106 Ariz. 119, 471 P.2d 731 (1970); City of Mesa v. Salt River Project Agr. Imp. Dist., 92 Ariz. 91, 373 P.2d 722 (1962); Peterson v. Flood, 84 Ariz. 256, 326 P.2d 845 (1958).

In this case, the obvious intent of the legislature was to prohibit the holding of another county or precinct office beside that of Supervisor.

The case of McCarthy v. State, 55 Ariz. 328, 101 P.2d 449 (1940) involved these statutes. Peterson, Foote and Frye were County Supervisors. Peterson's resignation was accepted by the other two on June 23, 1939. On the same day, by virtue of the existing statute, Foote and one Laveen, the County Recorder, for the purpose of filling the vacancy created by Peterson's resignation, met and nominated McCarthy, who, with Supervisor Foote, was a citizen member of the Welfare Board, both serving by appointment of the Board of Supervisors. (The Welfare Board consisted of one supervisor and two citizen members, appointed by the Board of Supervisors.) Frye nominated one Marlar. By a vote of Foote and Laveen, McCarthy was appointed, and on the same day took the oath of office and filed a bond, and assumed the duties of the office.

On June 23rd McCarthy filed his resignation as member of the Welfare Board. At a meeting of the Welfare Board, with Foote and Jamison present, the resignation was unanimously accepted, but not filed with the Board of Supervisors until June 24th. No affirmative action was taken by the Board of Supervisors. At a special meeting of the Board of Supervisors comprised of Foote, Frye and McCarthy the latter's resignation was presented by the Clerk of the Board and spread upon the minutes of that meeting.

On July 3rd at a regular meeting of the Board of Supervisors, Foote and McCarthy present, Frye absent, one Stanford was appointed a member of the Welfare Board, qualified, and promptly assumed his duties. On the same day Foote and County Recorder Laveen again convened for the purpose of selecting a member of the Board of Supervisors to fill the vacancy created by Peterson's resignation, and again appointed McCarthy who thereupon again took the oath of office and filed a new bond.

The state contended in a quo warranto action that McCarthy was ineligible for appointment to the Board of Supervisors on either of the two dates he was purportedly appointed for the reason that he was still a member of the Welfare Board, and his resignation had not been lawfully accepted, and his appointment was without authority of law and consequently null and void. The case was decided on the basis of the predecessors of the two statutes here involved.

The court held that under the eligibility clause of § 766, R.C.A. (1928) (here A.R.S. § 11-211) member of the Welfare Board was a *county* officer. It held that under § 94 R.C.A. (1928) (now § 38-296, A.R.S. (1956)) requiring that "his resignation, and lawful acceptance thereof" had not occurred by the events described above in the following language:

> "A different situation would exist had Supervisor Frye attended the meeting and voted with Supervisor Foote for Stanford's appointment, as that would have been tantamount to an implied acceptance of appellant's resignation under the rules above stated. * * * [U]nder the statute as it now exists the office does not become vacant until the resignation is lawfully accepted." Id. at 337-338.

Here Tom Shirley submitted his resignation from the office of School Board Trustee on November 22, 1972 to the County School Superintendent of Apache County, who accepted it in writing on November 23rd, before Shirley could ever assume the office of County Supervisor, (for which no vacancy occurred prior to January 1st, the date for assuming of office after the

former member of the Board's incumbency terminated). The language of the statute is carefully chosen "No person holding any other county or precinct office is eligible *to the office of supervisor*" not "to be nominated or elected" to the office of Supervisor. Thus § 11-211, A.R.S. is satisfied by removing the barrier to eligibility for the office of Supervisor before the date for which the office became vacant.

If it were in fact a "public office," the petitions for nomination or election should not have been accepted. Having been, and having been submitted to a vote of the electors, paragraph D of § 38-296, supra, would apply and the office of school board trustee would be declared vacant upon the acceptance by the Clerk of the Board of Supervisors of the petitions for nomination or election to the Board of Supervisors. The office of school board member would be declared vacant. The ensuing election would therefore be valid.

If § 38-296 is to be harmonized with § 11-211, Shirley's nomination or election papers should not have been accepted for filing, but they were, upon advice of the Attorney General that School Board Member was not an office proscribed under § 11-211, A.R.S. It is recognized that disqualifications provided by the legislature are construed strictly and there is a presumption in favor of the eligibility of one who had been elected or appointed to public office. McCarthy v. State, supra.

In State v. Myers, 89 Ariz. 167, 359 P.2d 759 (1961) this Court construed a constitutional provision making a member of the legislature ineligible to hold any other office in the following words:

> "[N]o member of the legislature, *during the term for which he shall have been elected,* * * * shall be eligible to hold any other office or be otherwise employed by the State of Arizona, or, any county, or incorporated city or town thereof * * *." (Emphasis added.)

A legislator who had been proclaimed elected to a term in the twenty-fifth legislature, but who refused to accept a seat therein,

was declared by this Court not rendered *ineligible* to accept the office of Judge of the Superior Court thereafter. By his own action in refusing to accept the term for which he had been elected he rendered himself eligible to accept appointment to another office. State v. Myers, supra.

We think it would be wooden indeed, to hold that Tom Shirley could not remove his ineligibility before the term of office began. As stated in State ex rel Nelson v. Jordan, 104 Ariz. 193, 450 P.2d 383 (1969):

> "In this a democratic society, we are irretrievably wedded to the principle that, subject to *constitutional* limitations, the will of the majority as expressed in free elections must prevail." (Emphasis added.)

As a matter of fact, it is extremely doubtful if a member of a school board could be considered holding a "public office".

The petitioner was a trustee of the Apache County School *District* No. 18 prior to and at the time of his election as a member of the Board of Supervisors of Apache County. The respondents contend that by holding an elective office, school trustee, the petitioner was ineligible to be elected to any other office. A.R.S. § 38-296 A provides:

> "No incumbent of an elective office, whether holding by election or appointment, shall be eligible for nomination or election to any office other than the office so held, nor shall the nomination papers of such incumbent be accepted for filing."

The term "elective office," however, is limited by the definitions found in A.R.S. § 38-101 which provides:

> "In this title, unless the context otherwise requires:
> "1. 'Office', 'board' or 'commission' means any office, board or commission of the state, or any political subdivision thereof, the salary or compensation of the incumbent or members of which is paid from a fund raised by taxation or by public revenue."

The type of office which is defined in subsection 1 of A.R.S. § 38-101 is that for which the salary or compensation is paid

from a fund raised by taxation or by public revenue. A school trustee does not receive compensation from the public treasury. Such an office is one of public service or trust, and it is not the type of office contemplated under the above statutes. The distinction between an office of profit and an office of trust has long been recognized in Arizona. See McCluskey v. Hunter, 33 Ariz. 513, 266 P. 18 (1928). Nor is it a 'county' or a 'precinct' office, it is at most a 'district' office. The petitioner was therefore not holding an elective office within the meaning of A.R.S. § 38-296 A, and he was eligible for nomination and election as a member of the Board of Supervisors of Apache County.

Concerning the question of whether Tom Shirley is immune from service of civil process by residing on the reservation, we fail to see how this could affect his office. He is subject to recall without service of process as any other officer, Article 8, Constitution of Arizona. His office shall be deemed vacant if any number of events occur, including ceasing to discharge the duties of the office for a period of three consecutive months, except when prevented by sickness, or absence from the State by permission of the Legislature. He is required to have a bond conditioned that he shall faithfully perform all official duties as required by law. A.R.S. § 38-251.

We cannot find any violation of the Fifth or Fourteenth Amendments on this account. That Tom Shirley is not a taxpayer has been declared no obstacle to voting or holding office. The Supreme Court of the United States has resolved this question in the following cases: City of Phoenix v. Kolodziejski, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970); Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); Kramer v. Union Free School District No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

It is therefore ordered that the preliminary injunction be quashed and the Superior Court of Apache County enter its judgment on the pleadings, directing that the Board of Supervi-

sors of Apache County issue its certificate of election declaring Tom Shirley the duly elected Supervisor of Supervisorial District No. 3 of Apache County, Arizona, and for petitioner's costs against Thomas E. Minyard, Ted Spurlock, Clair Platt and Jay Reese.

.....

Lorna E. Lockwood, Justice

CONCURRING:

.....

Jack D. H. Hays, Chief Justice

.....

James Duke Cameron, Vice Chief Justice

.....

Fred C. Struckmeyer, Jr., Justice

.....

William A. Holohan, Justice

APPENDIX B

SUPREME COURT

STATE OF ARIZONA

October 3, 1973

TOM SHIRLEY,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF APACHE; LAURANCE T. WREN, JUDGE OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF COCONINO (Sitting in Apache County); THOMAS MINYARD, TED SPURLOCK, CLAIR PLATT, JAY REESE, APACHE COUNTY BOARD OF SUPERVISORS and JAMES A. McDONALD, LARRY STRADLING and ARTHUR N. LEE, constituting the members thereof and MARGARET LEE, in her official capacity as Clerk of the Apache County Board of Supervisors, Real Party in Interest,

Respondents.

Supreme Court No. 11237 Apache County No. 4727

Filed Oct. 2, 1973

The following action was taken by the Supreme Court of the State of Arizona on October 2, 1973 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing — Denied.

"FURTHER ORDERED: Stay of Mandate — Denied."

CLIFFORD H. WARD, Clerk

By Mary Ann Dixon

Deputy Clerk

TO: Paul F. Eckstein, Esq., Brown, Vlassis & Bain, P. A., 222 North Central, 9th Floor, Phoenix, Arizona 85004

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Hon. Laurance T. Wren, Judge of the Superior Court, Coconino County Courthouse, Flagstaff, Arizona 86001

Hon. D. L. Greer, Presiding Judge, Apache County Courthouse, St. Johns, Arizona 85936

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APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

THOMAS E. MINYARD, TED SPURLOCK, CLAIR PLATT and JAY REESE, Plaintiffs, vs. APACHE COUNTY BOARD OF SUPERVISORS and JAMES A. McDONALD, and ARLO B. LEE, and BLAINE SLADE constituting the members thereof; MARGARET LEE in her official capacity as Clerk of the Apache County Board of Supervisors and TOM SHIRLEY, Defendants.	No. 4727 JUDGMENT

Filed Oct. 12, 1973

The Supreme Court of the State of Arizona having rendered its opinion on September 7, 1973, and having issued its Mandate on October 2, 1973 in No. 11237, the same being a Special Action brought *sub nom:*

"IT IS THEREFORE ORDERED that the Preliminary Injunction be quashed and the Superior Court of Apache County enter its Judgment on the pleadings directing that the Board of Supervisors of Apache County issue its Certificate of Election declaring Tom Shirley the duly elected Supervisor of Supervisorial District No. 3 of Apache County, Arizona, and for petitioner's costs against Thomas Minyard, Ted Spurlock, Clair Platt, and Jay Reese."

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant, said Board of Supervisors issue its Certificate

of Election declaring the defendant TOM SHIRLEY the duly elected Supervisor of Supervisorial District No. 3 of Apache County, Arizona.

IT IS THEREFORE ORDERED that the Complaint is dismissed with prejudice.

IT IS FURTHER ORDERED that plaintiffs THOMAS MINYARD, TED SPURLOCK, CLAIR PLATT, and JAY REESE shall pay defendant TOM SHIRLEY'S costs in this action, said amount to be determined by the Court upon application thereto.

DONE IN OPEN COURT this 11th day of October, 1973.

LAURANCE T. WREN, Judge

APPENDIX D

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

LESLIE E. GOODLUCK, KENNETH CHEE, STEVEN ASHLEY, SR., STANLEY E. ASHLEY, and ANDERSON YAZZIE, Plaintiffs, v. APACHE COUNTY; and MARGARET LEE, ARTHUR N. LEE, LARRY STRADDLING and JAMES A. McDONALD, individually and as clerk and members of the Apache County Board of Supervisors, Defendants.	No. Civ 73-626 PCT WEC COMPLAINT (CIVIL RIGHTS)

Filed Oct. 15, 1973

1. This is a civil action for injunctive and declaratory relief to prevent the deprivation under color of state law of plaintiffs' rights, privileges and immunities secured by the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. §1343.

2. Each plaintiff is a resident of Supervisorial District 3 of Apache County, Arizona and is a duly registered and qualified voter under the laws of Arizona.

3. Apache County is a unit of local government and body politic and corporate of the State of Arizona. Defendant Margaret Lee is the Clerk of the Apache County Board of Supervisors. The other defendants are the current members of the Apache County Board of Supervisors. The Board exercises general governmental authority within the County. It is comprised of three members, one elected from each of the three supervisorial districts of the County.

4. According to the 1970 Decennial Census, the population of the three supervisorial districts of Apache County is as follows:

District No. 1	1,589
District No. 2	3,905
District No. 3	26,984

These districts were established by defendants in April 1972.

5. The Fourteenth Amendment to the Constitution protects plaintiffs' votes from debasement resulting from malapportioned voting districts. This principle is commonly referred to as the "one man - one vote" rule, and it applies to the Apache County Board of Supervisors.

6. The acts of defendants in establishing the supervisorial districts of Apache County debase the value of plaintiffs' votes in violation of their rights under the Fourteenth Amendment and under 42 U.S.C. §§1981 and 1983.

7. Plaintiffs have no plain, speedy or adequate remedy at law and are entitled to an injunction requiring the reapportionment of Apache County into supervisorial districts with substantially equal population and requiring elections pursuant to said redistricting at the earliest practicable date.

WHEREFORE plaintiffs pray that this Court:

a. Assume jurisdiction of this action.

b. Issue an injunction ordering:

(1) That defendants submit to the Court a redistricting plan dividing Apache County into Supervisorial districts of substantially equal population;

(2) That failing such plan the Court accept a plan to be submitted by plaintiffs;

(3) That a redistricting plan dividing Apache County into Supervisorial Districts of substantially equal population be ordered into effect immediately;

(4) That the Court order supervisorial elections pursuant to said plan to be held during 1974.

c. Declare that the present Supervisorial Districts of Apache County are unlawful and violative of the Fourteenth Amendment and of 42 U.S.C. §§1981 and 1983.

d. Award costs of suit, attorneys' fees and such other relief as is just.

Dated: October 12, 1973

Respectfully submitted,

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Post Office Box 306
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Attorneys for Plaintiffs

APPENDIX E

8 U.S.C. § 1401:

(a) The following shall be nationals and citizens of the United States at birth:

(1) a person born in the United States, and subject to the jurisdiction thereof;

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided,* That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(3) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(4) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(5) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(6) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided,* That

any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of Title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of Title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date.

(b) Any person who is a national and citizen of the United States under paragraph (7) of subsection (a) of this section shall lose his nationality and citizenship unless—(1) he shall come to the United States and be continuously physically present therein for a period of not less than two years between the ages of fourteen years and twenty-eight years; or (2) the alien parent is naturalized while the child is under the age of eighteen years and the child begins to reside permanently in the United States while under the age of eighteen years. In the administration of this subsection absences from the United States of less than sixty days in the aggregate during the period for which continuous physical presnce in the United States is required shall not break the continuity of such physical presence.

(c) Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934; *Provided, however,* That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this chapter, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this chapter, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

(d) Nothing contained in subsection (b) of this section, as amended, shall be construed to alter or affect the citizenship of

any person who has come to the United States prior to October 27, 1972, and who, whether before or after October 27, 1972, immediately following such coming complies or shall comply with the physical presence requirements for retention of citizenship specified in subsection (b) of this section prior to its amendment and the repeal of section 1401b of this title.
As amended Oct. 27, 1972, Pub.L. 92—584, §§ 1, 3, 86 Stat. 1289.

42 U.S.C. § 1981:

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of the laws and proceedings for the securities of persons and property as enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

A.R.S. § 38-201:

A. Every officer shall be not less than eighteen years of age, a citizen of the United States and a resident of this state.

B. No person is eligible to any office, employment or service in any public institution in the state, or in any of the several counties thereof, of any kind or character, whether by election, appointment or contract, unless he is a citizen of the United States, but the provisions of this subsection shall not apply to the employment of any teacher, instructor or professor authorized to teach in the United States under the teacher exchange program as provided by federal statutes or the employment of university or college faculty members.

C. A person who is unable to speak, write and read the English language is not eligible to hold a state, county, city, town or precinct office in the state, whether elective or appointive, and no certificate of election or commission shall issue to a person so disqualified. As amended Laws 1959, Ch. 33, § 2; Laws 1972, Ch. 146, § 78.

A.R.S. § 11-211:

A. There shall be in each county having a population of two hundred thousand or more as determined by the latest United States decennial census a board of supervisors consisting of five members who shall be qualified electors of their supervisorial district, and who shall be elected at a general election at which the president of the United States is elected. In each county having a population of less than two hundred thousand as determined by the latest United States decennial census, a board of supervisors shall consist of three members, except as prescribed by subsection B, who shall be qualified electors of their supervisorial district and who shall be elected at a general election at which the president of the United States is elected. They shall enter upon their duties on January 1 subsequent to their election, and shall hold office for four years. No person holding any other county or precinct office is eligible to the office of supervisor.